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Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: March 14, 1960
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To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Capitol Airways, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause.

OPINION BELOW

The Opinion of the Court below (Appendix A, *infra*, pp. 1a-13a) is officially reported at 271 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1959. An Order denying petition for rehearing was entered on December 15, 1959. By order dated January 14, 1960 this honorable Court extended the time for filing Petition for Certiorari to March 14, 1960. The jurisdiction of this Court is invoked under 28 USC 1254 (1) and 47 USC 402 (J).

QUESTIONS PRESENTED

1. Whether, in an adjudicatory proceeding involving comparative fitness, Section 401 (d)(1) of the Civil Aeronautics Act requires the Civil Aeronautics Board to make findings when it denies (as distinguished from when it grants) an application for a certificate of public convenience and necessity.[1]

2. Whether the appearance, without notice or adjustment of time allocation, at oral argument before the Civil Aeronautics Board by members of Congress as advocates for a competitive applicant denied Petitioner a fair hearing.

STATUTES INVOLVED

The statutes involved are the Civil Aeronautics Act of 1938, as amended, 52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.*, and the Administrative Procedure Act, 60 Stat. 240 *et seq.*, 5 U.S.C. 1001 *et seq.* Particularly involved are Sections 401(d)(1) and 1005 (f) of the Civil Aeronautics Act and Section 8(b) of the Administrative Procedure Act; these statutory provisions are set forth in Appendix B, pp. 15a-16a.

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[1] It is undisputed that the applicability of the Civil Aeronautics Act to this case is unaffected by its repeal and replacement by the Federal Aviation Act of 1958, 49 USCA 1301 *et seq.*

STATEMENT OF THE CASE

This Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit which affirmed an Order of the Civil Aeronautics Board in a proceeding known as the *Great Lakes-Southeast Service Case*. The agency's Order denied your Petitioner's application for a certificate of public convenience and necessity and awarded to other air carriers the Miami-Chicago and Miami-Detroit routes which it sought.

At the time of the proceeding sought to be reviewed, your Petitioner was engaged in air transportation as an "irregular" or "non-scheduled" carrier. In its application to the Civil Aeronautics Board in Docket No. 7520, which was consolidated for hearing in the *Great Lakes-Southeast Service Case*, Docket No. 2396, *et al.*; Petitioner sought authority to engage in scheduled air transportation of persons, property and mail (on a non-subsidy basis) primarily between Miami and Chicago, and between Miami and Detroit. Your Petitioner proposed to operate a low-cost air coach service over these routes at fares about 26 percent below those being charged by the existing carriers. In support of this proposal 62 elaborate exhibits were submitted in evidence; these were supplemented by extensive testimony of sponsoring witnesses. Other carriers were applicants for comparable new route authority, and similarly submitted extensive evidence in support of their proposals, but none submitted any evidence rebutting Petitioner's "fitness, willingness or ability" to operate the proposed new air transportation service.

At the time of oral argument, the Board denied, *inter alia*, the request of Petitioner for additional time and then without prior notice allowed members of

Congress or their representatives to present oral argument and submit *ex parte* written material to the Board. While some of these Congressional presentations were confined to the public need for additional transportation, at least four Senators and one Congressman specifically advocated that Northwest Airlines be certificated over the Chicago-Miami route, in preference to other applicants, including your Petitioner.

Thereafter, in its opinion (Order No. E-13024, dated October 2, 1958) the Board denied the application of Petitioner and awarded the Chicago-Miami route to Northwest Airlines. No findings were made concerning Petitioner's fitness or the public need for the low-cost service which it proposed. Rather, the Board "found" that for various reasons the application of Northwest should be granted.

Petitioner then petitioned for Judicial Review claiming (1) that under Section 401(d)(1) of the Civil Aeronautic Act the Board must make findings when it denies an application for a certificate, and (2) that the Congressional appearances at oral argument in support of a competitor denied Capitol a fair hearing.

As to the first question, the Court below held that Section 401(d)(1) of the Civil Aeronautics Act "does not purport to deal with situations where the Board has decided *not* to grant the certificate" and that ". . . where one of competitive applications is held preferable to others . . . no further findings with respect to the unsuccessful applicants is required."

On the second question the Court below denied Capitol's motion for the appointment of a Commissioner or Referee to determine whether Northwest

had procured the Congressional testimony, and held that even though Northwest actively solicited such testimony this action did not constitute "undue influence" nor did the Congressional appearances at oral argument deny Capitol a "fair hearing".

REASONS FOR GRANTING THE WRIT

I. THE CONSTRUCTION GIVEN BY THE COURT BELOW TO SECTION 401(d)(1) OF THE CIVIL AERONAUTICS ACT IS ERRONEOUS, FAR REACHING, AND INCONSISTENT WITH OTHER STATUTORY PROVISIONS.

Section 401(d)(1) of the Civil Aeronautics Act provides as follows:

> "(d)(1) The Authority (Board) shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority (Board) hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

The question is whether the clause "otherwise such application shall be denied" requires that the Board make findings in cases where it *denies* an application for a certificate of public convenience and necessity. The Court below held that *no findings whatsoever* are necessary in these circumstances, stating—

> "As we read the section, it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided not to grant the certificate".

A. Not Only the Certification of Air Carriers, But the Certification of Motor Carriers, Water Carriers and Freight Forwarders is Governed by Provisions Substantially the Same as Section 401(d)(1) of the Civil Aeronautics Act

The construction of Section 401(d)(1) of the Civil Aeronautics Act is of importance to the transportation industry in general. The critical language, "otherwise such application shall be denied", applies to motor carriers (49, 551(a), 49 USCA 307(a)), water carriers (54 Stat. 941(C), 49 USCA 909(c)), and freight forwarders (56 Stat. 291(c), 49 U.S.C.A. 1010(c)), as well as to air carriers. The resolution of this problem is, therefore, one of general interest.

In *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957), an application for a motor carrier certificate was *denied* by the Interstate Commerce Commission. This action was reversed and remanded by the Supreme Court because of the *inadequacy of findings;* This Court stated:

> "Since the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said."[1]

The Declaration of Congressional Policy with respect to Civil Aviation as set forth in Section 2 of the Civil Aeronautics Act of 1938 (see Appendix B herein) is,

[1] See also the very recent decision in *Pacific Far East Line, Inc.* v. *Federal Maritime Board*, App. D.C. No. 15085 (Feb. 4, 1960), to the same effect.

for all practical purposes, the same policy as that set forth in the Transportation Act of 1940 (49 U.S.C.A. 1) as the "National Transportation Policy". The fact that the "National Transportation Policy" as set forth in the latter statute may not technically apply to air carriers, is of no consequence in this case since it is obvious that the Civil Aeronautics Board must administer the Civil Aeronautics Act of 1938 in accordance with the provision of Section 2 of that statute. In other words, the Board must make the same "findings" under the Civil Aeronautics Act of 1938 as the Interstate Commerce Commission must make under the Transportation Act of 1940.

Moreover, it is apparent that this Court in the *Schaffer Case* was not attempting to dictate to the Interstate Commerce Commission the manner in which that agency should apply the National Transportation Policy; rather, this Court was concerned with the lack of "findings" and hence the inability of the reviewing court properly to evaluate the Commission's decision. Thus, this Court stated (355 U.S. 86, 88):

> "Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation has been made in accordance with the mandate of Congress."

It should also be noted that Mr. Justice Frankfurter in his dissenting opinion in the *Schaffer Case* insisted that the Commission make adequate findings and set forth the reasons for its decisions. Mr. Justice Frankfurther stated (355 U.S. 95) as follows:

> "It is, however, pertinent to add that the Court's decision may serve a useful purpose if it will lead the Interstate Commerce Commission, despite its

enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commission's discretion in enforcing the most broadly expressed congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action."

B. The Decision That No "Findings" Need Be Made When an Application is Denied is Inconsistent With Both the Requirements for "Findings" Imposed by Section 1005(f) of the Civil Aeronautics Act and for "Reasons and Basis" Prescribed by Section 8(b) of the Administrative Procedure Act, as These Statutes Have Been Interpreted by the Court of Appeals, District of Columbia Circuit

Section 1005(f) of the Civil Aeronautics Act specifically requires findings of fact for *every* order—even orders denying applications. This is the effect of the decision in *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board*, 231 F. 2d 517 (D.C. Cir. 1956), where the Court reached this conclusion at pages 521-2:

> "The agency's findings must also be sufficiently definite to enable the courts to perform the task of judicial review. *Spiegel* v. *Public Utilities Commission*, 96 U.S. App. D.C. 307, 226, F. 2d 29, certiorari denied sub nom. *Capital Transit Co.* v. *Spiegel*, 1955, 350 U.S. 904, 76 S. Ct. 182; *Beaumont, S. L. & W. Ry.* v. *United States*, 1930, 282 U.S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221."

The Court also noted:

> "Despite these considerations, the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and

> was relevant to the Board's ultimate decision as to what the public convenience and necessity required. The Board's failure to supply an answer was not harmless error, but prejudiced Greensboro's position in its efforts to obtain judicial review. We think the Board should now make appropriate findings of fact on the issue, and state 'the reasons or basis' for its conclusion."

The Petitioner in the *Greensboro Case* was only an intervenor (as distinguished from an applicant) in the CAB proceeding complained of, and did not even participate in that proceeding until after the Examiner's Initial Decision. The contention sustained by the Court of Appeals was that

> ". . . the Board failed to make adequate findings showing the reasons for its *rejection* of Greensboro's contentions." (emphasis added)

This result, of course, was not based on Section 401 (d)(1), but rather on Section 1005(f) of the Civil Aeronautics Act which requires "findings" for "every order" and Section 8(b) of the Administrative Procedure Act which requires "findings and conclusions" as well as the "reasons and basis therefor."

The decision of the court below creates an inconsistency, which must be resolved by this Court. In the case of *United States* v. *Raymore*, 302 U. S. 540 (1938), rehearing denied in 303 U.S. 665 (1938), the Court stated at p. 547:

> "A construction of a statute that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress."

See also: *Helvering* v. *Credit Alliance Corporation*, 316 U.S. 107 (1942).

The court below cites *Continental Southern Lines* v. *CAB*, 197 F. 2d. 397 (D.C. Cir. 1952) and *North American Airlines* v. *CAB*, 241 F. 2d. 445 (D.C. Cir. 1957) in support of its decision that no "findings" need be made with respect to unsuccessful applicants. The Continental Southern and North American cases do not stand for any such proposition. Continental Southern Lines was a surface carrier attempting to enter the field of air transportation and hence required to comply with the provisions of Section 408 of the Civil Aeronautics Act, which, in effect, prevents surface carriers from participating in air transportation unless the Board finds that the surface carrier can "use aircraft to public advantage in its operation and will not restrain competition." Continental Southern had not even attempted to comply with the provisions of Section 408. In this connection the Court of Appeals for the District of Columbia Circuit held (197 Fed. 2d. 397, 401) that

> ". . . the applicant failed to make a record upon which the Board could either decide the Section 408 issue or determine whether there was a reasonable likelihood that its standards could be met."

Having failed to comply with the provisions of Section 408 Continental Southern Lines "could not furnish the immediate service which the public convenience and necessity required. . . ."[1] Hence, there was a *fatal defect* in the application of Continental Southern and under these circumstances the Court quite properly held that no further "findings" by the Civil Aeronautics Board were necessary.

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[1] 197 Fed. 2d. 397, 403.

The North American Airlines Case (241 Fed. 2d. 445) stands for substantially the same proposition as the Continental Southern Case, *supra*. In *North American* the Civil Aeronautics Board made numerous findings that the services proposed by the applicant would be less effective than those which other carriers could furnish. The Board also found that because of North American's previous record of violations of the Civil Aeronautics Act the applicant was not qualified to receive a Certificate of Public Convenience and Necessity. On appeal North American argued that the Board should not consider North American's violations without considering the violations of other applicants. This argument was rejected by the Court of Appeals for the District of Columbia Circuit citing *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 237, F. 2d. 209 (D.C. Cir. 1956).

It is therefore apparent that neither of the cases cited by the lower court stand for the proposition that a different standard applies to the case in which an application is denied by the Civil Aeronautics Board as opposed to a case in which an application is granted. Indeed, the doctrine, as set forth by the lower court, is completely illogical in view of the fact that an *unsuccessful* applicant is generally the party seeking judicial review of the decision of an administrative tribunal, whereas a *successful* applicant is generally willing to abide by the agency's decision.

II. THE PROPRIETY OF MEMBERS OF CONGRESS IN THE ROLE OF ADVOCATES IN ADJUDICATORY PROCEEDINGS BEFORE ADMINISTRATIVE AGENCIES IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

At least four Senators and one Congressman appeared at oral argument before the Civil Aeronautics Board to advocate the certification of Northwest Airlines for the Chicago-Miami route sought by Capitol. The record shows beyond a shadow of a doubt that the following Members of Congress (or their representatives) were not arguing for the "public interest" as such but rather for the selection of Northwest Airlines for the Chicago-Miami route as opposed to any other applicant. Thus, the record shows as follows:

> (1) Senator Edward J. Thye: "Mr. Chairman, my privilege of appearing before you this morning in behalf of Northwest Airlines in the Great-Lakes-Southwest Service Case is appreciated." (R. 14539)
>
> (2) Senator Hubert H. Humphrey (appearing through William Connell): ". . . The Senator is supporting in this case the application of Northwest Airlines for the Chicago-Miami route." (R. 14547)
>
> (3) Congressman Donald E. Tewes: ". . . The record clearly indicates that the choice of the Board should be Northwest." (R. 14559)
>
> (4) Senator Milton Young (appearing through Christopher U. Sylvester): "May I urge you, therefore, to authorize Northwest Airlines to provide this urgently needed new service between Chicago and Miami." (R. 14574)

In addition, the Board permitted Members of Congress, or their representatives, to submit to the Board during oral argument statements and/or telegrams allegedly supporting the application of Northwest Air-

lines without any notice to Capitol Airways, or, indeed, any opportunity to examine such documents. For example, the following statement appears at R. 14568:

> "My name is Ray Dockstader. I am assistant to Senator Mike Mansfield. I have two statements which I ask be made a part of the permanent record; one is a statement prepared by Senator Mansfield, supporting the extension of the routes of Northwest Airlines via Minneapolis and Chicago to Miami. He has attached a number of telegrams he would like to put into the record.
> "I also have a letter to the Board from Senator Murray, supporting Northwest's application."

These appearances were without prior notice to Petitioner, and followed an unsuccessful request by Petitioner for additional time for argument. In the Court below Capitol moved for the appointment of a Commissioner or Referee to determine whether the appearances of these Congressmen had been solicited by Northwest; the motion assumed that Northwest's initiative in this respect would constitute exertion of undue influence. The Court below denied the Motion and held that this procedure *did* not deny Capitol a "fair hearing" even though Northwest had "actively solicited" the Congressional appearances.

Petitioner claims that the appearance of Congressmen as advocates in a competitive adjudicatory proceeding necessarily violates the agency's "judicial character" as prescribed by its own Procedural Regulations.

The Board's Principles of Practice in Economic Proceedings as set forth in Part 300 of its Economic Regulations (14 C.F.R. Section 300 *et seq.*) provides in part as follows:

"It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:

* * * * *

"(c) It is improper that there be any effort by any interested person in the cases to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board . . ."

In its recent Opinion and Order Denying and Dismissing Portions of Petitions for Reconsideration in the *New York-San Francisco Non-stop Service Case*, Order No. E-14664, November 19, 1959, the Board itself pointed up the problem in these terms:

"These rules, with others, were promulgated in 1951 to serve as a guide for all parties and the Board and its staff in relation to proceedings before the Board. Unfortunately, as this case illustrates, uncertainties surrounding the regulation have limited its clarity and usefulness as a guide."

If, in fact, the Board is to permit the appearance at oral argument of any number of Congressmen as advocates for any particular applicant in an adjudicatory proceeding without prior notice to opposing parties, then all such proceedings before the Board are reduced to a sham. Indeed, under any such interpretation the applicant with the best chance of winning any particular case would be the applicant which, through political influence, can produce the most Congressmen in its behalf at oral argument. No judicial or quasi-judicial tribunal can possibly discharge its proper functions under any such rule.

Agency action that substantially and prejudicially violates the agency's rules cannot stand. See: *Sanga-*

mon Valley Television Corp. v. *United States*, 269 F. 2d 221 (D.C. Cir. 1959); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 372-3 (1957); *Jefferson Amusement Co.* v. *Federal Communications Commission*, 226 F. (2d) 277, (D.C. Cir. 1955); *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F. (2d) 437, 442-43 (D.C. Cir. 1949).

In every case "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955). It has not done so here. The only reason these Congressmen were asked to appear was because Northwest assumed that their appearance would have some influence on the administrative decision, irrespective of the facts of record in the case.

This is a matter of major concern to the Bar and the CAB itself. A panel discussion by representatives of Industry, Government and the Bar was held June 15, 1959, under the auspices of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, 86 Cong. 1st Sess. These hearings entitled "Major Administrative Problems" concerned in part the problem of Congressional advocates before the Civil Aeronautics Board. The Chairman of the CAB (Mr. Durfee) acknowledged that he knew of "no rule of the Board which specifically refers to the right of a Member of Congress to appear." (p. 33 of Hearings). He went on to the conclusion at pp. 38-9:

> "I can assure this Committee the Board has been very much concerned. This thing has been growing for 20 years and it has grown substantially in the past few years that I have been on this Board.

"I might say that as a former chairman of a State regulatory commission, it was a practice with which I had no experience. I never heard of a State legislator appearing before the Public Service Commission of Wisconsin to participate in oral argument.

"I might say that the growing irritation . . . that the members of the bar have with this practice, has been much more forcefully expressed here than I have ever heard it before, but, nevertheless, I have been conscious of it and I can assure you, Mr. Chairman, that the Board itself is studying this problem."

The allegation that the Board is "studying this problem" is of no comfort to your Petitioner. The denial of a fair hearing to Petitioner in this case cannot be cured by any subsequent change in the Board's Rules of Practice (or Legislation) which would limit or revoke the rights of Congressmen to appear at oral argument before the Board. The injustice which has been done your Petitioner cannot be remedied except by appropriate order of this Court.

The problem of Congressmen as advocates in adjudicatory proceedings is part of the recent criticism of the administrative agencies. See, for example: *Sangamon Valley Television Corp.* v. *U. S.*, 358 U.S. 49 (1958); *Id.*, 269 F. 2d 221 (D.C. Cir. 1959); *WIRL Television Corp.* v. *U. S.*, 358 U.S. 51 (1958); WORZ, *Inc.* v. *F. C. C.*, 358 U.S. 55 (1958); *Id.* 268 F. 2d 889 (D.C. Cir. 1959). This particular problem, no less than the others, should be reviewed by this court

CONCLUSION

The issues which Petitioner raises are of fundamental importance to the air transport industry and to other industries which are regulated by Federal Agencies. In the instant case your Petitioner's application for a certificate of public convenience and necessity was denied without any findings by the Civil Aeronautics Board. At oral argument before the Board various members of Congress were permitted to appear as advocates for a competing applicant without notice to your Petitioner; without opportunity to rebut their arguments and with no regard for a fair allocation of time to the various applicants.

The Court below held that in cases where the Civil Aeronautics Board denies an application for a certificate *no findings whatsoever* are required. The Court also held that the appearance of Congressmen at oral argument as advocates for a competing applicant did not deny your Petitioner a fair hearing even though such appearances were actively solicited by a competing (and successful) applicant.

The practical effect of the ruling of the Court below is to deny a fair hearing to any applicant in an adjudicatory proceeding before the Civil Aeronautics Board. Thus, any applicant for a certificate can, with the blessing of the Court below, win his case before the Board by exerting Congressional influence upon the Board without any regard to the record or the merits of his case. A competing applicant, who has endeavored to present his case on the merits, can never obtain effective judicial review (even though the decision of the Board might be completely arbitrary and capricious) because the Court below holds that *no findings*

are required in cases where the Board *denies* an application for a certificate.

In so far as the first question is concerned, the opinion of the Court below is in direct conflict with the opinions of other Circuit Courts, with the opinions of this Court and with the provisions of Section 1005(f) of the Civil Aeronautics Act and Section 8(b) of the Administrative Procedure Act. The second question (propriety of Congressional appearances at oral argument in an adjudicatory proceeding) is of far reaching importance directly affecting all adjudicatory proceedings before the Civil Aeronautics Board and indirectly affecting such proceedings before other similar Federal Regulatory Agencies.

By reason of the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 14, 1960

PROOF OF SERVICE

I, Coates Lear, attorney for Capitol Airways, Inc., Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on March 14, 1960 I served a copy of the foregoing Petition for Writ of Certiorari upon the persons listed below, by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

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